does not preclude other litigation by the persons affected." Restatement (Second) of Judgments, *supra*, § 41 cmt. d, at 397.

In *General Telephone Co. of the Northwest* v. *EEOC*, 446 U.S. 318, 326 (1980), the Court held that the EEOC's actions under Section 706 of Title VII of the Civil Rights Act of 1964 fall into the category of representative actions that do not preclude litigation by the persons affected. In particular, the Court held that such actions are not "representative actions" under Federal Rule of Civil Procedure 23. The Court reached that conclusion both because Title VII gives individuals a right to file their own actions, and because although the EEOC can secure specific relief for discrimination victims, in making its litigation decisions, "[the EEOC] is guided by the overriding public interest." 446 U.S. at 326 (internal quotation marks omitted). See *ibid.* ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

In *General Telephone*, the Court also squarely rejected the argument that an EEOC judgment precludes subsequent actions by individual employees. The Court explained that "[i]n light of the general intent to accord parallel or overlapping remedies against discrimination," it was "unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer." 446 U.S. at 333 (internal quotation marks omitted). The Court viewed that as "especially true given the possible differences between the public and private interests involved." *Ibid.* The Court specifically noted that "the

EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged." *Id.* at 331. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 296-297 (2002) (reaffirming that the EEOC may seek to further the public interest through awards of victim-specific relief, and that when it does so, it "does not stand in the employee's shoes").

While an EEOC judgment in a Title VII case is not binding on individual employees, courts are not "powerless to prevent undue hardship to the defendant." General *Tel.*, 446 U.S. at 333. The courts "can and should preclude double recovery by an individual." *Ibid.* And "where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action." *Ibid.* See *Waffle House, Inc.*, 534 U.S. at 297 (citing *General Tel.*).

b. The court of appeals in this case held that a different preclusion rule applies to individual actions brought under the ADEA because of the ADEA's different enforcement structure. Pet. App. 10a-12a. In particular, the court pointed to 29 U.S.C. 626(c)(1), which terminates an individual's right to file an ADEA action once the EEOC files a suit under the ADEA that seeks relief for that individual. In the court's view, that provision demonstrates that the EEOC is in privity with an individual when it seeks relief for that individual. Pet. App. 11a-12a. That reasoning, however, is at odds with the text and history of Section 626(c)(1).

Section 626(c)(1) specifies that the commencement of an EEOC action terminates "the right of any person to *bring* [an ADEA] action." 29 U.S.C. 626(c)(1) (emphasis

added). It does not state that the commencement of an EEOC action terminates the right of a person to *maintain* an ADEA action that was brought *before* the EEOC filed suit. Moreover, interpreting Section 626(c)(1) to cut off an individual's right to maintain an existing private action in those circumstances would be directly at odds with the history of Section 626(c)(1).

Section 626(c)(1) was modeled on a similar provision in the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 216(b), which was added to the FLSA in 1961. See *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 494 n.4 (3d Cir. 1990); *Burns* v. *Equitable Life Assurance Soc'y of the U.S.*, 696 F.2d 21, 23 (1982), cert. denied, 464 U.S. 933 (1983). The legislative history to Section 216(b) makes clear that it was not intended to terminate an action that was filed *before* the Secretary of Labor filed suit. H.R. Conf. Rep. No. 327, 87th Cong., 1st Sess. 20 (1961). Rather, "[c]ongressional reports suggest that although an employee may no longer initiate a new action once the Secretary has sued, an employee may continue to litigate, *i.e.*, 'maintain,' an action already pending." *Breuer* v. *Jim's Concrete, Inc.*, 538 U.S. 691, 695 n.1 (2003) (citing reports).[2]

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[2] The pertinent committee report accompanying the FLSA provision states:

> The bringing of an action by the Secretary seeking such relief with respect to such compensation owing to any employee would, after filing of the complaint in the Secretary's action, preclude such employee from becoming a party plaintiff in a private action to recover the amounts due and an additional equal amount as liquidated damages. The filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff *before* the

The general rule is that when a legal provision is transplanted from one source, "it brings the old soil with it." *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). And here, Congress explicitly provided that the provisions of the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in [the FLSA]," including those set forth in Section 216(b) of the FLSA. 29 U.S.C. 626(b). Accordingly, Section 626(c) of the ADEA must be construed in accordance with Section 216(b) of the FLSA. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

Section 626 carefully balances an employer's interest in avoiding duplicative litigation against an individual's interest in having his own day in court, and strikes the balance differently depending on whether the individual initiates her own suit before or after the EEOC commences suit. In that way, Section 626 forecloses the filing of suits by attorneys who "seek to reap the benefits of the EEOC's success," but does not discourage attorneys from agreeing to file private ADEA actions out of fear that, "no matter how close to resolution, or how much time spent," the suit "could be cut off by the EEOC filing a similar suit." *EEOC* v. *Eastern Airlines*, 736 F.2d 635, 640 (11th Cir. 1984).

Because of the history of Section 626(c)(1) and its limited scope and purpose, the court of appeals erred in concluding that it reflects a congressional intent to bind individuals, such as petitioners here, who have filed suit *before* the EEOC commences suit to the results of an

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Secretary's action.

H.R. Conf. Rep. No. 327, *supra*, at 20 (emphasis added).

EEOC judgment. To the contrary, because Section 626 preserves the right of such individuals to maintain their own ADEA actions, when they are brought before the EEOC commenced suit, the more natural inference is that Congress viewed the individual and EEOC actions in that context as "parallel or overlapping remedies against discrimination," *General Tel.*, 446 U.S. at 333, just as is true in the Title VII context (at issue in *General Telephone*) and in the FLSA context.

That is particularly true because the EEOC's role in ADEA actions is no different from its role in Title VII actions. While the EEOC has authority to seek relief for age discrimination victims in its conduct of litigation, it is guided by the overriding public interest in eliminating unlawful discrimination, as well as other considerations such as available resources to pursue enforcement efforts, not the narrow interests of particular individuals. The EEOC's decision not to appeal the judgment against it in this case is illustrative. In making that decision, the EEOC considered whether it would be in the *public's* interest to appeal, not whether it would be in *petitioners'* interests to appeal. In addition, the prospect of obtaining an adverse precedent in the court of appeals would obviously weigh more heavily in the EEOC's calculus than in an individual's decision to appeal.

While EEOC actions and previously filed individual actions are distinct, rather than mutually exclusive, remedies for unlawful discrimination, that does not mean that individuals may use individual actions to obtain additional relief. As is true under Title VII, a court may preclude an individual from double recovery under the ADEA, and it may condition an award under an EEOC judgment on an individual's agreement to relinquish his individual claim. But the court of appeals erred in hold-

ing that a judgment against the EEOC in an ADEA action operates as collateral estoppel in an action filed by an individual under state law before the EEOC itself commenced suit under the ADEA.

2. Nonetheless, review of the court of appeals' holding on that issue is not warranted. There is no square conflict in the circuits on that issue, and the issue does not arise with sufficient frequency, or have sufficient importance, to warrant review absent such a conflict.

a. Petitioners contend (Pet. 12, 19-20; Reply 6) that the decision below conflicts with the Second Circuit's decisions in *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044 (1982), and *Burns;* the Ninth Circuit's decision in *Merle Norman Cosmetics, Inc.* v. *Victa*, 936 F.2d 466 (1991); and the Eleventh Circuit's decisions in *Eastern Airlines* and *Riddle* v. *Cerro Wire & Cable Group, Inc.*, 902 F.2d 918 (1990). The decision below, however, does not conflict with any of those decisions.

In *Dunlop*, the Second Circuit held that the Secretary of Labor—who was responsible for enforcing the ADEA before that authority was transferred to the EEOC—lacked authority under Section 633(a) to extinguish a state law claim through a settlement with an employer. 672 F.2d at 1049 n.7, 1051. The court had no occasion to address whether the Secretary and an individual employee were in privity so that an issue resolved in a fully litigated ADEA judgment against the Secretary would have a collateral estoppel effect in a state law suit filed by the individual before the Secretary com-

menced suit. As a result, *Dunlop* did not address the preclusion issue presented in this case.[3]

Furthermore, since its decision in *Dunlop*, the Second Circuit has held that when an individual signs an agreement to arbitrate an ADEA claim, the EEOC may not seek monetary remedies for that individual. *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298, 303 (1998). In so holding, the court relied on the Third Circuit's holding in *U.S. Steel* that the ADEA's enforcement structure demonstrates that Congress intended the EEOC to serve as representative when it seeks relief for that individual. *Kidder, Peabody*, 156 F.3d at 302. That reasoning accords with, rather than conflicts with, the reasoning of the court of appeals in this case.

The Second Circuit's decision in *Burns* also does not conflict with the decision below. In that case, the EEOC filed an ADEA action several years after private individuals filed such an action. The EEOC originally named those individuals as aggrieved employees, but later agreed to dismiss any claim seeking relief for them. After the EEOC filed suit, the employer moved to dismiss the suit filed by the individuals based on the argument that Section 626(c)(1) requires the dismissal of pending private actions when the EEOC files suit. The Second Circuit rejected that claim, holding that under Section 626(c)(1), the commencement of an EEOC action

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[3] Even without regard to privity, there would have been no basis for asserting that res judicata or collateral estoppel barred the state law claims at issue in *Dunlap*. The settlement could not have had a res judicata effect because the Secretary had no authority to bring a state law claim, Pet. App. 19a n.10, and it could not have had a collateral estoppel effect because there were no common issues of law or fact that were actually litigated and finally resolved by the settlement. *Id.* at 6a.

does not affect previously filed private suits. 696 F.2d at 23-24.

Because *Burns* addressed only the question whether the *filing* of an EEOC action terminates a previously filed action by virtue of Section 626(c)(1), and did not address whether a *judgment* in an EEOC action can operate as collateral estoppel in such an action, it does not conflict with the decision below. The latter issue depends on the resolution of the further question—whether Section 626(c) reflects a congressional intent to preserve a previously filed action as a fully independent remedy or whether it instead reflects a more limited purpose to provide a separate remedy that is unaffected by an EEOC judgment only when the individual action results in a judgment first or when the interests of the EEOC and the individual diverge. In addition, the latter issue requires consideration of this Court's precedents, such as *General Telephone*, discussing the preclusive effect of actions undertaken by the government that seek relief for particular individuals. Moreover, as discussed above, the Second Circuit in *Kidder, Peabody* adopted the view that the EEOC acts as a representative of private individuals when it seeks relief for them, and that view accords with the view of the court below.

The Ninth Circuit's decision in *Merle Norman* also does not conflict with the decision below. In that case, Victa brought a state law claim in state court. The EEOC subsequently filed its own ADEA action seeking relief for Victa and entered into a consent decree that provided for injunctive relief, but did not provide make-whole relief to Victa. See *Victa* v. *Merle Norman Cosmetics, Inc.*, 24 Cal. Rptr. 2d 117 (Ct. App. 1993). The employer sought to enjoin the litigation of Victa's state law claim on the ground that the EEOC's judgment pre-

cluded Victa from litigating it. The district court refused to issue an injunction, and the Ninth Circuit affirmed. After expressing doubts that Victa's state law claim was actually decided by the EEOC's judgment, the court of appeals upheld the district court's refusal to issue an injunction on the ground that the employer could litigate that issue in state court and doubts about the propriety of issuing the injunction should be resolved in favor of allowing the state court to act. *Merle Norman*, 936 F.2d at 468. The Ninth Circuit never reached the question whether an EEOC judgment operates as collateral estoppel in an individual action brought under state law.

Nor is there any conflict between the decision below and the Eleventh Circuit's decisions. *Eastern Airlines*, like the Second Circuit's *Burns* decision, addressed only whether the commencement of an EEOC action terminates an individual's previously filed ADEA action. The Eleventh Circuit, consistent with the Second Circuit, held that it does not, 736 F.2d at 639-641, and did not address the separate question whether a judgment against the EEOC operates as collateral estoppel in such an action. In *Riddle*, the Eleventh Circuit held that a consent decree entered into by the EEOC did not operate as res judicata or collateral estoppel in a subsequently filed private action. *Riddle*, however, involved a Title VII suit, not an ADEA suit, and it therefore does not conflict with the court of appeals' decision in this ADEA case.

b. The question presented does not arise with sufficient frequency to warrant the Court's review in the absence of a clearly developed circuit conflict. During the nearly 40 years since the enactment of the ADEA, the question whether an EEOC judgment has a res judi-

cata or collateral estoppel effect on a previously filed state law action has arisen only rarely. Nor is the issue likely to arise with any frequency in the future. Over the past ten years, the EEOC has filed between 21 and 41 ADEA cases each year, and in cases where the EEOC has filed, there has rarely been a previously filed private action. There is no reason to conclude that the instances of parallel EEOC and private litigation will increase in the future. Moreover, even in the rare cases in which there is parallel litigation, the collateral estoppel issue could arise only when the cases are not consolidated and resolved together, and even then, only when the individual is sufficiently dissatisfied with the resolution achieved in the EEOC action and sufficiently optimistic about the chances for a different result to be willing to bear the costs of further litigation.

The importance of the issue is further diminished by the fact-specific limitation that the court of appeals placed on its preclusion holding. The court expressly held that its decision does not apply when there is a clear divergence of interest between the EEOC and the private individual, Pet. App. 10a-11a, such as where the EEOC settles for injunctive relief and abandons its claim for monetary relief. *Id.* at 13a-14a; see *id.* at 10a-11a ("[T]he EEOC is not *always* to be considered the representative of individuals on whose behalf it brings an ADEA action"; "[i]n a situation where there is a clear divergence of interests between the EEOC and the aggrieved individual, we must determine *in each case* whether privity exists.") (emphasis added).

For the reasons discussed above, an approach that presumes that there is privity between the EEOC and a private individual unless the court can identify a clear divergence of interests is not consistent with a proper

understanding of the ADEA's enforcement structure. But the exception to the court's ruling for cases where there is a clear divergence of interests may materially ameliorate the potentially harmful consequences of the decision. That exception, together with the absence of a conflict in the circuits and the infrequency with which the issue arises, counsels against granting plenary review of the first question in this case.

B. The Remaining Questions Presented Do Not Implicate Any Conflict And Do Not Warrant Plenary Review

Petitioners also seek review of two additional questions. The first is whether the court of appeals erred in failing to defer to a state appellate court determination that the EEOC's judgment does not have a collateral estoppel effect on petitioners' state law action. Pet. ii. That question also does not warrant review.

The Full Faith and Credit Act requires federal courts to give state judicial proceedings "the same full faith and credit * * * as they have by law or usage in the courts of such states." 28 U.S.C. 1738. In *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518, 524 (1986), the Court held that Section 1738 applies to state law determinations on the res judicata effect of a federal judgment. Accordingly, "[o]nce the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state's court's decision."

Applying *Parsons*, the court of appeals in this case correctly held that it was not required to give full faith and credit to the state appellate court's determination that the EEOC's judgment did not have a preclusive effect on petitioners' state law action. Louisiana law

gives preclusive effect only to judgments that are final; the state appellate court's collateral estoppel determination in this case, however, was interlocutory rather than final. As a result, a federal court was not required to give full faith and credit to the state court's collateral estoppel determination. Pet. App. 7a-8a.

Petitioners argue (Reply 5) that principles of comity and federalism nonetheless required the court of appeals to defer to the Louisiana appellate court's determination. But absent the command of the Full Faith and Credit Act, a federal court is not required to defer to a state court determination on the preclusive effect of the federal court's own judgment. In that circumstance, the Anti-Injunction Act, 28 U.S.C. 2283, expressly authorizes a federal court to make its own determination. While there may be circumstances in which it would be appropriate for a federal court to exercise its discretion to allow the effect of its judgment to be resolved in the state courts with the possibility of further review in this Court, *Parsons*, 474 U.S. at 526, the question whether this is such a case is fact-bound, does not implicate any conflict among the circuits, and does not present any issue of recurring importance.

The last question presented by the petition (Pet. 25-29) is whether the court of appeals was required to apply a clear-error standard of review to the district court's determination that the EEOC was not in privity with petitioners. Review of that question is not warranted. The resolution of the privity issue in this context is a question of federal law subject to do novo review, not a question of fact subject to clear-error review. Petitioners cite no authority that would support a contrary conclusion. Moreover, to the extent there is a subsidiary question of how a court of appeals should conduct the

case-specific privity inquiry fashioned by the Fifth Circuit below (which itself is erroneous for the reasons stated at pp. 6-12, *supra*), that subsidiary question does not merit review for all the reasons that the more fundamental preclusion issue does not justify plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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